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Supreme Court, U.S.
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No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER JOSÉ ERNESTO MEDELLÍN

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INTEREST OF AMICUS CURIAE[1]

By signing and ratifying the Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, the Governments of Mexico and the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States promised that detained Mexican nationals would be promptly notified of their right to seek consular assistance, and that Mexico would be permitted to provide consular protection to those nationals. In turn, Mexico promised to extend those same rights to the United States and to its nationals detained in Mexico. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States agreed that irreconcilable disputes over the interpretation and application of the treaty's provisions would be resolved by the International Court of Justice ("ICJ"). Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325.

On March 31, 2004, the ICJ rendered its judgment in *Avena and Other Mexican Nationals*. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31)[hereinafter "*Avena* Judgment"]. The ICJ held that the United States had violated the rights of Mexico and of Mr. Medellín under Article 36 of the Vienna Convention. As a remedy for those violations, the ICJ held that the United States must provide Mr. Medellín with meaningful review

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[1] No person or entity other than the Government of Mexico made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this *amicus*.

and reconsideration of his conviction and sentence that gives full effect to the purposes of Article 36.

On February 28, 2005, President George W. Bush determined that the United States would discharge its international legal obligations under the *Avena* Judgment by having state courts give effect to the ICJ's decision. Mexico welcomed the President's Determination as a substantial step toward fulfilling the United States's obligations to Mexico and the International Court of Justice. Accordingly, Mexico filed an *amicus* brief in the Texas Court of Criminal Appeals in support of Mr. Medellín's argument that the President's Determination constituted binding federal law. Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006) (No. AP-75207).

On November 15, 2006, the Texas Court of Criminal Appeals held that neither the *Avena* Judgment nor the President's Determination constituted binding federal law, brushing aside the legal obligation of the United States to abide by the remedial decree entered against it in an international adjudicative proceeding that it had agreed by treaty to accept as binding. *Ex parte Medellín*, No. AP-75207, 2006 WL 3302639, at *7, *24 (Tex. Crim. App. Nov. 15, 2006.

Mexico has a direct interest in the United States's compliance with the *Avena* Judgment. The very purpose of Article 36 of the Vienna Convention is to permit the parties to that Convention – including Mexico, the United States, and 169[2] other countries – to protect the interests of their

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[2] STATUS OF MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, U.N. TREATY COLLECTION (available at

citizens when they are arrested or otherwise detained while living, working, or traveling abroad. Since well before the trial of Mr. Medellín, Mexico has provided critical resources to aid in the defense of its nationals facing the death penalty. *See, e.g.*, Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. LAW 359, 366-374 (2003). Consular officials provide funding for experts and investigators, assist in gathering documents relevant to the penalty phase defense, assist in conducting mitigation investigations, act as a liaison with Spanish-speaking family members, and most importantly, ensure that Mexican nationals are represented by competent and experienced defense counsel. Not surprisingly, the United States government acknowledges that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) 186 (Nov. 3, 2003).

Mexico respectfully requests that this Court grant certiorari in order to ensure that the United States fulfills its international treaty obligations and grants Mr. Medellín the remedy to which he is entitled.

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http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp) (last visited Mar. 5, 2007).

REASONS FOR GRANTING THE PETITION

I. Mexico and the United States Agreed by Treaty to Submit Disputes About the Vienna Convention to the International Court of Justice for Binding Resolution.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

On January 9, 2003, after determining that the United States had violated the Vienna Convention in virtually every case in which a Mexican national was facing the death penalty, and after unsuccessfully seeking remedies for those nationals through legal and diplomatic channels, Mexico invoked the Optional Protocol and brought suit in the International Court of Justice. *See* Mexico's Application Instituting Proceedings, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), *available at* http://www.icj-cij.org. The United States fully participated in those proceedings, at the conclusion of which the ICJ found that the United States had violated the Article 36 rights of 51 Mexican nationals, including Mr. Medellín. *Avena* Judgment, ¶ 153(4)–(7).

The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by both the United States and Mexico. By Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." United Nations Charter, art. 94, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031. By Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the International Court of Justice, art. 59, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1055.

Since both Mexico and the United States consented to the ICJ's jurisdiction and committed to abide by the resulting judgment, Mexico fully expects the United States to implement the ICJ decision. Cordial and cooperative bilateral relations depend strongly upon good faith compliance by each nation with mutually binding treaty obligations. Each nation expects, and must be able to rely upon, its treaty partners to adhere to their obligations. President George W. Bush recognized this cardinal principle of foreign affairs when he issued the February 28 Presidential Determination.

Under both international and United States law, the *Avena* Judgment constitutes a binding adjudication of Mr. Medellín's rights that the United States must fully implement. It has been nearly three years since the ICJ ruled in *Avena*, and the U.S. promise to comply with the ICJ decision remains unfulfilled. Mexico respectfully requests that this Court reverse the judgment of the Texas court and remand the case with instructions to provide the remedy

mandated by the President and International Court of Justice.

II. This Court Should Not Leave Unreviewed a State Court Decision that Violates the United States's Obligations to Mexico.

A. The United States Must Provide Review and Reconsideration of Mr. Medellín's Conviction and Sentence as Required by Avena.

In *Avena*, the International Court of Justice held (by fourteen votes to one, the majority including Judges from both the United States and Mexico) that the United States had violated its obligation under Article 36(1) to inform Mr. Medellín of his right to consular notification and assistance, as well as the rights of Mexico to communicate with him, render consular assistance, and arrange for his legal representation. *Avena* Judgment, para. 153(4)-(7). To remedy these violations, the ICJ held that the United States had to provide "review and reconsideration" of Mr. Medellín's conviction and sentence by fully assessing the prejudice caused by the Vienna Convention violations. *Id.* at para. 153(9). The ICJ rejected the United States's argument that review and reconsideration could be achieved through the clemency process, holding instead that the review must occur "within the overall judicial proceedings relating to the individual defendant concerned." *Id.* at 141; *see also id.* at 140.

The United States agrees that it has an international legal obligation to comply with the *Avena* Judgment. *See* Petition for Writ of Certiorari at 187a, *Medellín v. Texas*, ___ U.S. ___ (Jan. 16, 2007) (No. 06-984). Accordingly, the President determined that the United States would discharge

its obligations under *Avena* by having state courts give effect to the decision. *Id.* The Texas Court of Criminal Appeals, however, held that neither the Avena Judgment nor the Presidential Determination were binding upon it. Specifically, the Texas Court found that the President of the United States had exceeded his executive authority to ensure that the nation complied with its obligations under *Avena*. *Ex parte Medellín*, 2006 WL 3302639, at *24.

The absence of an executive agreement between the United States and Mexico was "central" to the Texas court's plurality decision that the President had exceeded his constitutional powers. *Ex parte Medellín*, 2006 WL 3302639, at *17. The plurality characterized the Presidential Determination as a "unilateral act executed in an effort to achieve a settlement with Mexico," when no actual settlement had been reached. *Id.* at *16. It implied that the United States and Mexico should "negotiate" the conditions under which the United States should carry out its obligations under the *Avena* Judgment, observing that the negotiation process "ensures that each sovereignty is represented and heard." *Id.* "What is ultimately achieved through that process, which invariably involves compromise, will reflect a meeting of the minds--a settlement that embodies the terms, conditions, rights, and obligations agreed to during the negotiation process." *Id.*

The Texas court's decision reflects its utter failure to grasp the nature of the international legal proceedings that led to this litigation. Both the United States and Mexico had already agreed *in advance* to be bound by the *Avena* Judgment by acceding to the Optional Protocol, the United Nations Charter, and the ICJ Statute. *See supra* at 4-5. The *Avena* Judgment represents the "settlement" of Mexico's dispute with the United States, and it fully addresses the "rights and obligations" of the United States with respect to

the remedy owed to Mr. Medellín. The International Court of Justice agrees:

> [T]he ICJ has always taken the view that it would be incompatible with the spirit and the letter of the [ICJ] Statute and with judicial propriety to deliver a judgment the validity of which would be subject to the subsequent approval of the parties or which would have no practical consequences so far as their legal rights and obligations were concerned. . . . Since, furthermore, a case can only be submitted to the Court and decided by it if the parties have in one way or another consented to its jurisdiction over the case in question, it is rare for a decision not to be implemented. Generally speaking, those States which accept the jurisdiction of the Court are ready to comply with its decisions.

INTERNATIONAL COURT OF JUSTICE, ICJ HANDBOOK 75 (5th ed. 2004) (citations omitted), *available at* http://www.icj-cij.org/icjwww/igeneralinformation/ibleubook.pdf (last visited March 6, 2007). *Cf. La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned").

Accordingly, there is no need for "negotiation" and "compromise," nor are the parties required to reach a "meeting of the minds" with regard to the *Avena* Judgment. Indeed, it was precisely because negotiations had failed to resolve this dispute that Mexico invoked the Optional Protocol and initiated proceedings before the ICJ.

Likewise, there is no need for a negotiation process that will "ensure that each sovereignty is represented and heard," for both Mexico and the United States were

"represented and heard" before the International Court of Justice. A 16-lawyer delegation represented the United States during the one-week hearing in which both nations presented their arguments. The State Department's Legal Adviser, Principal Deputy Legal Adviser, Assistant Legal Adviser for Consular Affairs and Assistant Legal Adviser for United Nations Affairs, an Associate Deputy Attorney General from the Justice Department, and distinguished professors of international law and comparative criminal procedure all argued for the United States. *See Avena* Judgment, preface. Mexico, in turn, was represented by fifteen lawyers, including the legal adviser to the Mexican Foreign Minister, the Chief of Staff for the Under-Secretary for Global Affairs and Human Rights, the Head of the International Litigation Section of the Mexican Foreign Ministry, the Head of the International Law Section of the Mexican Foreign Ministry, and other distinguished professors and advocates. *Id.*

To support its claims before the ICJ, Mexico submitted a 177-page Memorial supported by a 1300-page Annex of documentary evidence and written testimony. In rebuttal, the United States submitted a 219-page Counter-Memorial along with a 2500-page Annex of documentary evidence and written testimony. Both parties' submissions exhaustively examined the factual predicates for the violations in each national's case, and argued all relevant points of law. Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (June 20, 2003); Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (Nov. 3, 2003).

The ICJ's final judgment reflects its careful consideration of the arguments raised by both nations. Although the Court vindicated Mexico's claims that the

United States had violated its international legal obligations in the case of Mr. Medellín and 50 other Mexican nationals, the Court rejected several arguments advanced by Mexico. In doing so, it took pains to respect ongoing capital proceedings in the United States. The Court rejected Mexico's request for a remedy that would have obligated the United States to vacate each national's conviction and sentence without inquiring whether the Article 36 violation affected the fairness of the underlying proceedings. Instead, the Court called upon the United States judiciary to provide a fair process by which the Vienna Convention violations could be fully considered and remedied, on a case-by-case basis.

Finally, although the ICJ took great care to define the parameters of adequate "review and reconsideration," the Court left to the United States the choice of means to implement the Judgment. *Avena* Judgment, ¶154(9). Thus, it is for the United States—not Mexico—to decide which courts are best suited to carry out the process of review and reconsideration. Mexico's interest is in ensuring that each Mexican national subject to the *Avena* Judgment receives full and fair review and reconsideration of his conviction and sentence under the terms set forth in the *Avena* Judgment. As a first step toward fulfilling the ICJ's mandate, Mexico welcomed the Presdential Determination. Had Mexico opposed the President's action, it would not have submitted an amicus brief to the Texas Court arguing that the court should abide by the President's determination.

B. Failure to Review This Case Could Have a Negative Impact on Bilateral Relations Between the United States and Mexico.

As neighbors and trading partners, the United States and Mexico have an extraordinarily close relationship. Inevitably, the two nations have differed on matters ranging from boundary lines and trade practices to the treatment of each country's nationals. When such disagreements have arisen, Mexico and the United States have attempted to resolve them amicably, often through arbitration. Arbitration has staved off armed conflict, resolved boundary disputes and indemnified private investors as well as individuals who claimed personal injury or denial of due process. Both countries have benefited from international arbitration of their disputes. This may explain why "the history of the relations between the United States and Mexico shows a constant endeavor to resort to this means of settlement." A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS 1 (1935).

The commitment of both nations to peaceful dispute resolution through arbitration wavered only once, and the results were disastrous. In 1910, the United States and Mexico agreed to arbitration to resolve a long-running border dispute in El Paso, Texas. Convention for the Arbitration of the Chamizal Case, June 24, 1910, U.S.-Mex., 36 Stat. 2481. The Convention established that the decision of the arbitral commission would be "final and conclusive upon both Governments, and without appeal." 36 Stat. 2483. Nevertheless, when the Commission awarded a large portion of the disputed tract to Mexico, the United States refused to comply with the judgment. ALAN C. LAMBORN & STEPHEN P. MUMME, STATECRAFT, DOMESTIC POLITICS, AND FOREIGN

POLICY MAKING: THE EL CHAMIZAL DISPUTE 54-55 (1988). The effects of this decision upon bilateral relations were "significant and lasting," and the United States's refusal to comply became "an integral part of almost every diplomatic issue arising between the two nations" for the following 52 years. SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL DISPUTE 30 (1965). In addition to souring relations between the two countries, *see id.* at 77, the United States's reaction to the judgment led Mexico to reject arbitration as a method of resolving disagreements with United States and British oil companies after President Lázaro Cárdenas nationalized the Mexican oil industry in 1938. *Id.* at 75, 100. Moreover, it led Mexico to temporarily suspend its compliance with the Pious Fund judgment entered by the Permanent Court of Arbitration. See LAMBORN AND MUMME, *supra*, at 171; ANTONIO GÓMEZ ROBLEDO, MEXICO Y EL ARBITRAJE INTERNACIONAL 101 (1965).

In 1963, the United States finally recognized the Chamizal arbitral award. See LISS, supra, at 89. In announcing the decision to comply with the Commission's judgment, President Kennedy acknowledged the United States had been wrong in rejecting the award. See President's Message to the Senate Transmitting the Convention for the Solution of the Problem of the Chamizal, 88th Cong. 1-3 (1963); Transcript of the President's News Conference on Foreign and Domestic Matters, N.Y. TIMES, July 6, 1962, at A8.

Since then, the United States and Mexico have submitted numerous economic disputes to international tribunals for resolution. And in the early 1990s, both nations signed and ratified the North American Free Trade Agreement, which provides unprecedented opportunities for arbitration of disputes between states and private investors

Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289-397, 605-779. In *Metalclad v. Mexico*, an arbitral tribunal awarded a United States-based corporation $16.685 million in damages. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID AF) (Aug. 20, 2000). Although Mexico had vigorously contested Metalclad's claims, it complied with the judgment. Explaining its decision to pay Metalclad in accordance with the tribunal's decision, Mexico reaffirmed its commitment to honor its international obligations, "even when it does not agree with the findings of the international tribunal nor with the way the tribunal works." Eye on Investors, Mexico Pays U.S. Company, N. Y. TIMES, Oct. 29, 2001, at A4.

As the examples above make clear, both the United States and Mexico have long understood that when a dispute is submitted by mutual consent to an international tribunal for resolution – as under the Optional Protocol to the Vienna Convention – the resulting judgment is final and binding. Mexico and the United States are both party to over 50 instruments that provide international dispute resolution mechanisms.[3] If the Texas court's decision is allowed to

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[3] The subject matter of these treaties encompasses topics as diverse as taxation, *see* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 18, 1992, U.S.-Mex., art. 26, 1992 U.S.T. LEXIS 193; copyrights, *see* Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731; narcotics, *see* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, art. 32, 1988 U.S.T. LEXIS 194, *80-81; pollution, *see* International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, art. XIII, 12 U.S.T. 2989; aviation, *see* Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, Aug. 15, 1960, art. 13, U.S.-Mex., 12 U.S.T. 60; and chemical weapons, *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their

stand, Mexico and other nations will begin to doubt the utility of entering into such agreements with the United States.

Finally, if this Court fails to correct the judgment of the Texas court, the United States will breach its obligations to Mexico under the *Avena* Judgment and bilateral relations will suffer as a consequence. As this Court has previously observed,

> [o]ne of the most important and delicate of all international relationships, recognized immemorially as a responsibility of a government, has to do with the protection of the rights of a country's own nationals when those nationals are in another country.

Hines v. Davidowitz, 312 U.S. 52, 64 (1941).

III. The Court Should Grant Review of This Case Now in Order to Protect Human Lives and Prevent Irreparable Damage To U.S.-Mexico Relations.

Mexico initiated proceedings before the ICJ at a time when no Mexican national faced imminent execution in order to ensure that the United States would have ample time to investigate Mexico's claims, present its counter-arguments, and implement any resulting judgment in Mexico's favor. In the three years since the *Avena* Judgment was issued, however, the United States has failed to provide the remedy mandated by the ICJ. During this time, Mr. Medellín and other Mexican nationals have promptly and diligently

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Destruction, *opened for signature* Jan. 13, 1993, art. XIV, 14 U.N.T.S. 45.

pursued their rights under the *Avena* Judgment. Yet to date, only one court has granted judicial review and reconsideration of a Mexican national's conviction and sentence in light of the *Avena* Judgment. *Torres v. State*, 2005 OK CR 17, 120 P.3d 1184 (Okla. Crim. App. 2005).

If the Court were to deny the writ of certiorari in this case, the effects of the Court's decision would be immediate and irreversible. Ten Mexican nationals whose cases the ICJ adjudicated in *Avena* are on death row in Texas and could face imminent execution. On March 7, 2007, the Texas Court of Criminal Appeals denied relief in five of those cases, citing its earlier decision in *Ex parte Medellín*.[4] Execution of those nationals without providing the remedy mandated by the ICJ would unquestionably affect bilateral relations between the United States and Mexico. Granting review in a later case would not suffice to cure this injury, since the rights of those Mexican nationals would no longer be capable of vindication.

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[4] These five cases were resolved jointly in a one-page, unpublished decision on March 7, 2006. The individual cases decided were: *Ex parte Cesar Roberto Fierro*, No. WR-17,425-05; *Ex parte Ignacio Gomez*, No. WR-52,166-02; *Ex parte Humberto Leal Garcia*, No. WR-41,743-02; *Ex parte Roberto Moreno Ramos*, No. WR-35,938-02; *Ex parte Ruben Ramirez Cardenas*, No. WR-48,728-02; *Ex parte Felix Rocha Diaz*, WR-52,515-03.

CONCLUSION

Amicus curiae the Government of Mexico respectfully urges this Court to grant Mr. Medellín's petition for certiorari.

Respectfully submitted,

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